UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANWAR ALKHATIB,

Plaintiff, DECLARATION

-against-

NEW YORK MOTOR GROUP LLC, et al. Case # 13-cv-2337 (ARR)(SMG)

Defendants.
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RICHARD SIMON, an attorney admitted to practice in this court and in the courts of the State of New York, hereby affirms the truth of the following under the penalties of perjury and pursuant to 28 U.S.C. § 1746:

1. I am counsel for the four remaining defendants [Mamdoh Eltouby, Nada Eltouby and the two dealerships]. This in opposition to the plaintiffs' spoliation motion. In September 2014 I substituted in place of attorney Lloyd Weinstein in the Tuhin case; in June 2016 I substituted in place of attorney Bruce Minsky in the other five of the initial six related cases. My appearance herein was thus long-after retention of the hard-drive of the DVR of New York Motor Group's surveillance system was an issue.

2. This affirmation is submitted with the Declarations of my client Mamdoh Eltouby and of Faisal Khan [owner of the Auto Solution dealership]. Familiarity with the contents of both is assumed; I therefore incorporate the contents of both declarations without repeating same. Plaintiffs' motion must be denied as all images of the complained-of purchases of each of the nine plaintiffs (with finance manager Estrada in the finance office), had previously been eradicated from the hard drive by the surveillance system itself.

3. New York Motor Group's action leaving its rudimentary surveillance system behind in its disposed-of trailer when it vacated the leased premises (after the DCA revoked its operating license), under the circumstances that images of the plaintiffs' meetings had automatically long-before been erased from the DVR, wasn't a willful abdication of its responsibility to cooperate in discovery. The Eltouby declaration re-affirms his deposition testimony that the audio portion of the system hadn't yet been installed when the plaintiffs' purchases occurred. The images sought wouldn't in any event show the contents of transaction documents; they would only reveal who was present and what took place. My clients have no interest in Estrada testifying; he was convicted of serious crimes, in part due to Eltouby's cooperation with the District Attorney. Estrada not only stole monies from customers; he also stole from the dealership and sought to prevent the absent Eltouby from learning of his thefts. Plaintiffs haven't shown any need for any information which theoretically could have been extracted from the hard drive; as they conducted a pre-trial deposition of Estrada and their motion reveals their intent to use same at trial. Each of the plaintiffs is expected to testify as to what occurred during their respective negotiations/purchases with Estrada, and my clients don't have witnesses to contradict that anticipated testimony, especially as Mamdoh Eltouby wasn't present at any of plaintiffs' meetings with Estrada and never spoke with any of the plaintiffs at the time of their purchases. It appears plaintiffs' sole rationale for their claim of purported

prejudice [if the hard drive had retained its images] would be to establish if Nada had been in the finance office during plaintiffs' meetings with Estrada. As plaintiffs already have the deposition testimony of Estrada favorable to their claim that Nada had been at plaintiffs' purchase-meetings with Estrada, their contention of prejudice is baseless.

4. Magistrate Judge Gold conducted numerous discovery conferences, in-person and by-telephone, with counsel. This spoliation issue could have been resolved by plaintiffs raising this matter during said conferences before Magistrate Judge Gold. That they failed to do so requires the denial of their motion, especially as it is not truly a motion in limine, but is instead directed at pre-trial discovery compliance.

5. Plaintiffs' motion confirms that both of my predecessor counsel duly informed plaintiffs' counsel that the hard-drive hadn't retained any images of plaintiffs' transactions with Estrada. The motion also contains my letter of February, 2015 to plaintiffs' counsel responding to their omnibus discovery demands, wherein I also confirmed the foregoing. Plaintiffs cannot contend that me and my prior counsel weren't consistently transparent. To assist plaintiffs' counsel, I investigated the identity of the successor tenant at the dealership's leased premises, and I thus informed plaintiffs' counsel that the Auto Solution dealership was the successor tenant and was using the trailer, and had hired a different vendor to install an upgraded surveillance system. Plaintiffs' motion includes their subsequent information/document subpoena

they later served on Auto Solution---and they assert they never received a response. Despite that I had provided them the foregoing information, their subpoena reveals it was served upon all counsel in this litigation, except me!

6. I am scheduled for life-saving vascular surgery tomorrow at New York Presbyterian Hospital and haven't been able to travel in recent days. I was in contact by telephone with Yoel Cohen, the technician who installed the DVR at the dealership in 2013 and who serviced the surveillance system thereafter. He told me that no back-up retention system had been installed, and that all information on the hard drive was recorded over automatically and was thereby erased forever. I asked him to provide a sworn statement for submittal to this court, but he said he would first want to meet with me. His office is in Brooklyn, and due to my medical condition, I wasn't able to travel to meet with him. I ask the court's permission to submit his expected sworn declaration within 7 days after my discharge post-surgery, so I can comply and meet with him. He owns a respected technology company; its website is set forth in the Eltouby declaration.

WHEREFORE, it is respectfully requested that plaintiffs' motion be denied, and that appropriate sanctions be imposed on plaintiffs.

/s/ RS, ESQ.

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RICHARD SIMON, ESQ.

Dated: March 23, 2017
Kings Park, NY